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Exclusive Hiring Halls In The Construction Industry

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RECENT DECISIONS

EXCLUSIVE HIRING HALLS IN THE CONSTRUCTION INDUSTRY

Congress, in 1947, enacted the Labor-Management Relations Act (Taft-Hartley Act),[1] which was a substantial revision of the National Labor Relations Act (Wagner Act),[2] the basic legislation in the labor area.

One of the prime targets for correction was the closed shop permitted under the old Wagner Act. The closed shop makes the union the exclusive agency which supplies manpower to an employer and requires that a person must be a union member as a condition precedent to employment.[3] Section 8(a)(3) of the Taft-Hartley Act prohibiting employers from discriminating against employees in order to encourage or discourage union membership, was aimed at prohibiting the closed shop by allowing no form of union security agreement other than the union shop.[4]

The Wagner Act created the National Labor Relations Board and gave it exclusive jurisdiction over the rights created and duties imposed by the act upon management and labor.[5] The Labor Board's jurisdiction and authority was carried forward into the Taft-Hartley Act with some modifications not here relevant. Before 1947 the Labor Board had refused to take jurisdiction in cases involving the construction industry for a variety of possible reasons.[6] It may have felt the industry lacked effect upon interstate commerce, or that it was essentially a migratory type of employment which would make designation of a bargaining unit extremely difficult. The Labor Board reversed its policy after 1947 presumably compelled by the feeling that Congress intended to change certain abuses in the construction industry.[7] The Board stated in *Wadsworth Building Company,* "We believe, as we have on other occasions indicated, that it would effectuate the policies of this Act and accord with Congressional intent to assert jurisdiction over cases such as this though involving the local construction industry, where interference therewith would have a substantial effect on interstate commerce. As legislative history shows, Congress, in enacting Section 8(b)(4)(A), as well as other provisions of the act, intended, among other things, to reach certain practices prevailing in the construction industry

1. 61 Stat. 136 (1947), 29 U.S.C. § 141 et seq.
2. 49 Stat. 449 (1935), 29 U.S.C. § 155-66.
3. Report of the President, Proceedings of the Forty-Third Annual Convention of the Building and Construction Trades Department of AFL, 129 (1950).
4. § 8(A)(3) of the Taft-Hartley Act exempts the union shop from its proscription: ". . . Provided, that nothing in this subchapter, or in any other statute of United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . ."
5. Supra note 2, § 153.
6. Brown & Root, 51 N.L.R.B. 820 (1943).
7. Wadsworth Building Company, 81 N.L.R.B. 802 (1949).

which it deemed were detrimental to the public interest and which it expected to eliminate thereby."[8]

Bringing the construction industry under the purview of the Taft-Hartley Act meant that the traditional closed shop prevailing therein would have to be modified to accord with Section 8(A)(3) (the employer discrimination clause), which prohibits the closed shop. The unions and employers in the industry then resorted to a form of contract whereby the union was made the exclusive hiring agency, but employment was not conditioned upon union membership and the employer had the right to reject any laborers sent by the union. This arrangement is known in the industry as the exclusive hiring hall system.[9] The union acts as an employment processing department in addition to being a bargaining agent. The hiring hall assured to the contractor a ready supply of experienced labor and a convenient method of processing such labor.[10] The courts have upheld the validity of this mode of hiring as not violative of the employer discrimination clause, absent acts of discrimination on the part of the employer, induced by the union in order to encourage membership.[11]

A recent case in the Ninth Circuit, *N.L.R.B. v. Swinerton*,[12] overruled the position maintained by the Labor Board, that an exclusive hiring hall contract, without guarantees against discrimination, was illegal *per se*. The court followed *N.L.R.B. v. Contrall*,[13] holding that an employer violates the employer discrimination clause of the act if he requires membership in a labor organization precedent to employment. It went on to say, "A referral system without guarantees of non-discrimination is not *per se* illegal. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. Such a referral system does not violate the act absent evidence of actual discrimination."[14] This reasoning was in line with the Board's own position upon this point as was revealed in *Hunkin-Conkley Construction Company*, where the Board stated, *inter alia*, "Moreover, assuming, *arguendo*, that the respondent company and the respondent unions had entered into such an agreement, we have not found a provision that personnel be secured through the offices of a union violative of the act, absent evidence that the union unlawfully discriminated in supplying the company with personnel."[15]

The exclusive hiring hall contract was more or less accepted by the Board until its decision in *Mountain Pacific Chapter of the Associated General Con-*

8. Id. at 804.
9. Sen. Rep. No. 105, 80th Cong. 1st Sess. 6 (1947).
10. Hearings Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong. 1st Sess. 155 (1951).
11. Hunkin-Conklyn Const. Co., 95 N.L.R.B. 433 (1951).
12. 202 F.2d 511 (9th Cir. 1953).
13. 201 F.2d 853 (9th Cir. 1953).
14. Supra note 12 at 515.
15. Supra note 11 at 435.

tractors.[16] The Board, in that case, held the language of the exclusive hiring contract violated the act upon its face and tended to unlawfully encourage union membership. The pertinent provisions of the exclusive hiring hall clause read, "(a) The recruitment of employees shall be the responsibility of the union and it shall maintain offices or other designated facilities for the convenience of the employers when in need of employees and for workmen when in search of employment. The employers will call upon the local union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained. Should a shortage of workmen exist and the employer has placed orders for men with the union, orally or written, and they cannot be supplied by the union within 48 hours, the employer may procure workmen from other sources."[17]

The Board took the position that this contract was illegal irrespective of actual discriminatory hiring practices or illegal pressures proscribed by the Taft-Hartley Act. Thus the Board interpreted the contract in the light of the employer discrimination clause to be an unlawful method to encourage membership in a labor organization. It reasoned thus, "The contract or hiring arrangement need not explicitly limit employment to union members to be unlawful. The statutory phrase 'encourage membership in a labor organization,' is not minutely restricted to enrollment on the union books; rather, it necessarily embraces also encouragement towards compliance with obligations of union membership and participation in union activities generally."[18]

In taking the above position the Labor Board purported to follow the general rule laid down by the Supreme Court in *Radio Officer's Union v. N.L.R.B.*,[19] a leading decision construing the employer discrimination clause of the Taft-Hartley Act. This decision was a consolidation of three cases with three different fact situations, all revolving around a construction of the employers' discrimination clause. In one set of facts the union prevailed upon the employer to reduce an employee's seniority for failure to pay his dues. The second was a case where the union refused clearance for a radio operator to work on a ship because he failed to comply with established hiring hall procedures of the union, and the company hired another man sent by the union solely because of union demands. The third case involved a bargaining unit which induced the employer to pay union members a wage increase to the exclusion of non-union members where the union was the bargaining agent of all employees of that particular company. In holding that these fact situations showed violations of the employer discrimination clause, the Supreme Court elucidated as follows, "We read the language . . . to mean that subjective evidence of employee response was not contemplated by the drafters, and to accord with our holding that such proof is not required where encouragement

16. 119 N.L.R.B. 883, 41 LRRM 1460 (1958).
17. Id. at 894.
18. 41 LRRM 1460, 1462.
19. 347 U.S. 17 (1953).

or discouragement can reasonably be inferred from the nature of the discrimination.

"Encouragement and discouragement are subtle things requiring a high degree of introspective perception, *Labor Board v. Donnelly Garment Company.* . . . But . . . it is common experience that the desire of employees to unionize is raised or lowered by the advantage thought to be obtained by such action. Moreover, the act does not require that the employees discriminated against be the ones encouraged for purposes of violation of Section 8(A)(3). Nor does the act require that this change in employees' quantum of desire to join a union have immediate manifestations."[20]

On the basis of the Supreme Court's reasoning in *Radio Officer's Union v. N.L.R.B.*,[21] from which the preceding quotation was taken, the Board felt it could infer a tendency to illegal encouragement from the mere fact of an exclusive hiring hall or referral system established by contract between the union and employer's association absent specific provisions for non-discrimination.

The Board set out in brief form its opinion on what would be required in an exclusive hiring hall contract to pass the test of *Mountain Pacific.* The basic non-discrimination clauses must embody ". . . (1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union memberships, policies, or requirements. (2) The employer retains the right to reject any job applicant referred by the union. (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."[22]

The very existence of an exclusive hiring hall agreement might tend to encourage union membership, but the Board felt that this would be a valid encouragement. They realized that Section 8(A)(3) did not intend to proscribe all conduct between the employer and union which had a tendency to encourage union membership. They expressed this view thus, "However, appraisal of the statute as a whole and the large body of decisional law based upon it, shows that there are many literal forms of encouragement to union memberships that are not prohibited. The better representation a union affords, the more successful it is in wresting economic advantage from the employer for the employees, the more it will attract members to it; i.e., 'encourage union memberships.' Clearly such encouragement alone does not always violate Section 8(A)(3); a line must be drawn between lawful and unlawful encouragement."[23]

20. Id. at 51.
21. Supra note 19.
22. Supra note 18 at 1462.
23. Supra note 16 at 897-98.

Member Murdock dissented from the position taken by the Board on what constitutes a valid exclusive hiring hall contract. He felt that the hiring hall contract, without the above enumerated guarantees was not invalid *per se* as held by the Board, stating that this had been the Board's position for the past 7 years, and had been approved by every circuit court of appeals which passed upon the issue. Murdock also alluded to the point that Senator Taft himself had stated the provision proscribing the closed shop was not aimed at hiring halls such as were used in the maritime industry. Here the majority was invalidating a contract which the author of the bill, the courts, Congress, and previous board cases had held to be perfectly legal.

The Circuit Court of Appeals for the Ninth Circuit passed upon the Board's decision in *Mountain Pacific*,[24] and ruled that it had erroneously interpreted Section 8(A)(3) by deciding that the contract was invalid upon its face. The Court ruled that absent proof of discrimination an exclusive hiring hall arrangement was valid without a specific clause in it requiring non-discrimination. They relied upon their previous decision in *N.L.R.B. v. Swinerton*[25] and other Board cases to show such a contract was not the kind aimed at by Section 8(A)(3) and was a valid form of union encouragement under the doctrine of *Radio Officers v. N.L.R.B.* The purpose of the act being, under the *Radio Officers* case "to insulate employees' job rights from their organizational rights."[26]

But the Court in *Mountain Pacific* did not merely direct the Board to give effect to existing law, it stated that it could see no reason why, for future cases, it could not give special significance to the fact that an exclusive hiring hall contract did not contain provisions against discrimination. Thus the Board could shift the burden of proof from the General Counsel to the respondents to prove there was no discrimination in the operation of the contract.

This position of the Court of Appeals is placed in the setting of a contract in which no anti-discriminatory clauses are found. The Board, under its power to fashion its own rules of evidence as the common law courts do, from case to case may presume discrimination and place the burden of proof on the respondents to affirmatively show otherwise. This is, in effect, accepting the Board position, for it would be extremely more burdensome for an employer and a union to prove that they did not discriminate in the first instance than to refute charges of discrimination based upon specific facts. In reality, the better path would be to include in exclusive hiring hall contracts the clauses required by the Board than run the risk of having to prove on trial the fact of a non-discriminatory hiring hall.

It is submitted, however, that a rigid application of the Board's *Mountain Pacific* doctrine to the construction industry is not justified, in the first place,

24. 270 F.2d 425 (9th Cir. 1959).
25. Supra note 12.
26. Supra note 19 at 52.

because of the peculiar conditions prevailing in that industry. As stated by the Senate Subcommittee on Labor and Management Relations, these conditions are:

"(1) Each employer constructs on numerous separate projects each year.

"(2) Until a project is started he has no manual employees.

"(3) On each project there are usually several employers frequently using different crafts of workmen.

"(4) On each project there is a constant shifting of crews on and off the job as work progresses.

"(5) In each crew there are frequent changes in the men when the crew returns to the job.

"(6) There is not a time on the job when all men and all crews eventually employed will be so employed at the same time.

"(7) The workmen are drawn from an area pool of available workmen who will work for many or all employers in the area, or may drift from one area pool to another area pool.

"(8) When a workman's function on a job is temporarily finished they are laid off and returned to the pool for use on other jobs or by other construction employers.

"(9) A vast number of projects in the industry are of a few days' or hours' duration for a given craft.

"(10) This quick need and rapid shifting of men in and out of the pool to various projects requires a previous established and uniform understanding of employment terms for all jobs and for all contractors in order to avoid delays in hiring and misunderstandings as to the terms of employment.

"(11) Each employer's policy as to wages and working conditions must be comparable to that of other employers of men in the pool."[27]

In view of the above conditions, some arrangement such as a union hiring hall must be maintained if the basic advantages, to the worker, of union organization are to be had. Two of the most important are the acquiring of seniority rights and some type of job security which extends beyond any given employer. One of the most prized possessions of a worker is seniority, and if the construction worker cannot acquire it at the hiring hall phase, he will not have it at all, for there are no feasible methods of acquiring seniority with a given employer given the essentially necessary transitory nature of employment with any given construction company.[28] The policy behind the Taft-Hartley Act could not have been to deny to construction workers the minimum of security provided by the exclusive hiring hall contract, by requiring the company be always free to reject a worker, without cause, referred to it by the union hall.

27. Supra note 10 at 145.
28. Sherman, Legal Status in Hiring Process, 47 Geo. L.J. 203 (1958).

The L.M.R.A. was not passed by Congress as a reaction to the construction industry and particularly its own peculiar closed shop. This legislation was meant to abolish the closed shop of the factory, not of the building unions. The N.L.R.B. could have administratively refused to apply the Taft-Hartley proscription in its literal form to the exclusive hiring hall, but the board chose to enforce it literally with consequent confusion and instability created.[29] When Congress enacts legislation for the N.L.R.B. to implement, of necessity, it leaves a good measure of discretion to the Board in applying such legislation to varied social and economic conditions. In a field so broad, all encompassing, diversified and complex as labor and management relations, subtlety of mind, unity of basic purpose, and an intelligent grasp of the general object and policy behind the banning of the closed shop are required for successful and rational implementation of the Taft-Hartley Act. The Board's job is to reduce this policy to working rules, evolved from case to case, striking a rational, coherent, and feasible balance between literal application of the Congressional command and a reasonable evaluation of exactly which objective conditions were aimed at and what result was expected. When the Board applies the closed shop proscription wholesale and indiscriminately to almost all exclusive union referral systems, as evidenced by its post *Mountain Pacific* decisions,[30] it abdicates its quasi-legislative and quasi-judicial functions and reduces itself to a mere fact finding board which the Supreme Court, in the *Radio Officers* case,[31] emphatically stated it was not. But the variance between the explicitly stated rationale of agency action and its underlying basic motives being at times so unrelated,[32] the critical conclusion stated probably is an oversimplification.

The recent passage of the Landrum-Griffin Bill effected an amendment to Section 8 of the Labor Management Relations Act,[33] which recognized some of the unique conditions of the construction industry enumerated above. A new subsection "f" was enacted, applying specifically to the construction industry. The "grace period" for becoming a union member was shortened from thirty to seven days;[34] a contract calling for union referral of job applicants is expressly permitted, and unions and employers are now permitted to provide in their contracts for a system of priority in selecting job applicants according to length of service with an employer or in the geographical area. Seemingly, this added provision would allow the characteristic hiring hall arrangement of the industry. On close analysis, however, it is noted that while contracts in the industry may be entirely in compliance with the new subsection, the Board may still apply its *Mountain Pacific* criteria, since management is still

29. Impact of Taft-Hartley Upon Building and Construction Industry, 60 Yale L.J. 673 (1951).
30. Local 357, Teamsters v. N.L.R.B., 121 N.L.R.B. 1629 (1958).
31. Supra note 19 at 48.
32. Schwartz, Comparative Television and the Chancellors Foot, 47 Geo. L.J. 655 (1958). See also Jaffe, "The Scandal in T.V. Licensing," Harpers, Sept. 1957, p. 77.
33. Labor-Management Reform Act of 1959, P.L. 86, 86th Cong., S. 1555.
34. Supra note 4.

not free to contract away its employment prerogatives. Any question on this point which may arise from the reading of the new provision is quickly dispelled by reference to the report of the House and Senate Conference Committee on the bill. " . . . Nothing in such provision is intended to restrict the applicability of the hiring hall provisions enunciated in the *Mountain Pacific* case (119 N.L.R.B. 883, 893). . . ."[35] The task of properly implementing the basic objectives of the Act remains the province of the Board. In the hiring hall area, the task cannot be considered complete by simply following the rule of *Mountain Pacific*.

ALEXANDER MANSON

MANNER OF PUBLICATION DETERMINATIVE OF ACTION FOR INVASION OF PRIVACY

It is the accepted procedure, and rightly so, that any discussion of the right of privacy start with a reference to the law review article by Warren and Brandeis which has been widely acknowledged to be the birthplace of the right of privacy.[1] Prior to the publication of the article, no right of privacy was recognized by the common law. It was the purpose of the authors to consider whether the then existing law afforded a principle which could properly be invoked to protect the privacy of the individual, and, if it did, to determine the nature and extent of such protection.[2] They concluded that the law afforded such a principle.[3] New York, the first state to consider the existence of the right, rejected its existence.[4] Shortly thereafter, however, Georgia held such a right existed and,[5] currently, over twenty states recognize and protect the right of privacy, while three states, including New York, have adopted a limited statutory right of privacy.[6]

It is not surprising that the existence of the right received such ready recognition. In 1890, Warren and Brandeis said that "Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency."[7] Those same abuses exist today, and, along with technical advances in the field of communications, and the willingness of the courts to recognize a cause of action for mental disturbance, account for the rapid, and almost inevitable,[8] growth of the right of privacy.

Today the courts are no longer faced with the problem of the existence

35. U.S. Code Congressional and Administrative News, 3186 (1959).

1. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
2. Id. at 197.
3. Id. at 206.
4. Roberson v. Rochester Folding Box Company, 171 N.Y. 538, 64 N.E. 442 (1902).
5. Pavesich v. New England Life Insurance Company, 122 Ga. 190, 50 S.E. 68 (1905).
6. Prosser, Torts, 636-637 (2d ed. 1955); see N.Y. Civ. Rights Law § 51.
7. Warren and Brandeis, supra note 1, at 196.
8. 1 Harper and James, Torts, § 683 (1956).